REMARKS

Claims 1-21 and 23-44 are pending in the Application. Claims 1-44 were rejected in the Office Action mailed February 4, 2008. Claims 1, 13, 19, and 42 are amended, and claim 22 is cancelled by this response. Claims 1, 13, 19, and 42 are independent claims, while claims 2-12, 14-18, 20-21 and 23-41, and 43-44 depend either directly or indirectly from independent claims 1, 13, 19 and 42, respectively.

The Applicant respectfully requests reconsideration of claims 1-21 and 23-44, in light of the following remarks.

Rejection of Claims Under 35 U.S.C. §112

Claims 1-44 were rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. The Office Action asserted the claims were "omnibus" type claims. The Office Action also stated, "The term 'gracefully' is indefinite." The MPEP describes an omnibus claim as reading as follows: "A device substantially as shown and described." MPEP 2173.05(r). Applicant respectfully traverses the assertion that the claims are omnibus claims, as they do not claim in that fashion. As the Office Action provided no other explanation for the objection on "omnibus" grounds, Applicant understands the sole objection on indefiniteness grounds to relate to the term "gracefully." Applicant respectfully disagrees with the rejection on that ground, and believes the term "gracefully" to be sufficiently definite to one skilled in the art. Nevertheless, Applicant has amended claims 1, 13, 19, and 42 (the claims identified in the Office Action) to remove the term "gracefully" from those claims. Applicant notes that the removal of the "gracefully" term is not intended to reduce the scope of any claim. In light of the foregoing, Applicant respectfully submits that claims 1-21 and 23-44 are allowable under 35 U.S.C. § 112.

Rejection of Claims Under 35 U.S.C. §103(a)

Claims 1, 3-6, 8-11, 19-31, 35-36, 38, and 40-43 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,842,783, Boivie et al. (hereinafter "Boivie") in view of U.S. Patent No. 6,952,714, Peart (hereinafter "Peart"). Additionally claims 13-18 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Boivie in view of U.S. Patent No. 6,959,327, Vogl et al. (hereinafter "Vogl"). Further, claims 2, 7, 12, 32-34, 37, 39, and 44 were rejected as being unpatentable over Boivie and Peart further in view of Vogl.

Before turning to specific claims, Applicant notes that the Office Action did not provide an explicit *Graham* analysis, or provide a clear articulation of the rationale or analysis used to determine obviousness. While Applicant will address the analysis for certain particular claims in more detail below, Applicant now notes that the Office Action generally stated that particular claims were obvious because "it would have been obvious to a person of ordinary skill in the art at the time the invention was made to modify the system of Boivie in view of [Peart and/or Vogl]." Further, the Office Action then generally stated that "One would be motivated to do so because…" To the extent these assertions purport to be an application of the "TSM" test, Applicant respectfully submits that the Office Action has, in many cases, failed to identify the asserted "motivation" in the prior art or provide evidence or explanation of how such knowledge would be in the knowledge generally available to one of ordinary skill in the art. Further, the motivations generally provided are not the type of motivation previously found to be implicit, as they are not "technologically independent" nor merely "stronger, cheaper, cleaner, faster, lighter, smaller, more durable, or more efficient." *See* Federal Register, Vol. 72, No. 195 at 57534, citing *DyStar Textilfarbe GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1368 (Fed. Cir. 2006). Instead, the Office Action appears to be presenting an improper "hindsight" analysis. To the extent the rejections are not an application of the TSM test, Applicant submits they further fail to provide an explicit analysis of why the claims would have been obvious. Applicant respectfully submits that, in light of the shortcomings of the prior art pointed out below, in further

view of the lack of explicit analysis and/or improper application of the "TSM" test provided by the Office Action, that the presently claimed subject matter is allowable.

Rejection of claims 1, 3-6, 8-11, 19-31, 35-36, 38, and 40-43 as unpatentable over Boivie in view of Peart

Applicant will first address the rejection of independent claims 1, 19, and 42. Starting with claim 1, Applicant respectfully submits that claim 1 (and its dependent claims) are allowable because Boivie and Peart, either alone or in combination, do not teach, suggest, or otherwise render obvious a method of managing incoming access requests during an update event from a plurality of electronic devices, including, *inter alia*, "determining the availability of at least one device server to process the incoming access requests, based upon the at least one update-related parameter" and "immediately processing incoming access requests upon determining that the at least one device server is available." The Office Action asserted that Boivie teaches "determining the availability of at least one device server to process the incoming access requests" and "immediately processing incoming access requests upon determining that the at least on device server is available." The Office Action recognized that "Boivie does not explicitly teach monitoring and evaluating the incoming access requests using the at least one update-related parameter wherein determining step is based upon the at least on update-related parameter." The Office Action then asserted that "Peart teaches monitoring and evaluating the incoming access requests using the at least one update-related parameter wherein determining step is based upon the at least one update-related parameter."

Applicant respectfully traverses those assertions. First, the Office Action asserted that Boivie teaches "determining the availability of at least one device server to process the incoming access requests" at col. 5, lines 25-28, which states, "The CBM selects a request from the queues, selects one of the servers 101 (e.g., Server_1, Server_2, Server_3, etc.) to service the request, and sends the request to that server." Applicant respectfully submits that the cited portion of Boivie does not teach or suggest

"determining the availability of at least one device server." Rather, Boivie merely discusses selecting one server from a group to receive an access request. In contrast, the presently claimed subject matter includes determining the availability of at least one server, in contrast to selecting one server out of a group of servers. Applicant further notes that Boivie is not generally directed to determinations of availability of at least one server, but instead, "The present invention [of Boivie] is directed at controlling the allocation of this link bandwidth among multiple customer Web sites on the Web server cluster 100, by controlling incoming Web requests at the CBM 110." (Boivie, col. 5, lines 35-38.) As a result of the foregoing discussion, Applicant respectfully submits that Boivie does not teach or suggest "determining the availability of at least one device server."

The Office Action next asserted that Boivie teaches "immediately processing incoming access requests upon determining that the at least one device server is available" at col. 5, lines 29-31, which states, "The selected server receives the Web request, services it, and sends the response directly back to the client 130 (e.g., Client_3) along path 160." Thus, the cited portion of Boivie discusses a Web request served by a selected server. In contrast, the presently claimed subject matter recites "immediately processing incoming access requests upon determining that the at least one device server is available." Again, the cited portion of Boivie does not teach or suggest determining that the at least one device server is available, let alone immediately processing incoming access requests upon making such a determination.

Applicant appreciates the Office Action's recognition that Boivie does not teach "monitoring and evaluating the incoming access request using the at least one update-related parameter wherein determining step is based upon the at least one update-related parameter." However, the Office Action asserts that Peart discloses "monitoring and evaluating the incoming access request using the at least one update-related parameter wherein determining step is based upon the at least one update-related parameter" at col. 29, lines 55-58, which state, "The request typically includes a parameter that identifies the selected data file on the web server, such as a Uniform

Resource Locator (URL)." Applicant respectfully submits that the cited disclosure of Peart does not teach or suggest the required "determining step," let alone monitoring and evaluating the incoming access requests using the at least one update-related parameter and determining the availability of at least one device server to process the incoming access request, based upon the at least one update-related parameter.

In short, neither Boivie nor Peart, alone or in combination, teach or suggest the step of determining the availability of at least one server device. Because they do not teach the step of determining the availability of at least one server device, they similarly cannot teach immediately processing incoming access requests upon determining that the at least one device server is available.

The Office Action concluded that it would be obvious to modify the system of Boivie in view of Peart by "implementing monitoring and evaluating the incoming access request using the at least one update-related parameter wherein determining step is based upon the at least one update-related parameter." However, as discussed above, even if, *arguendo*, one would modify the system of Boivie in view of Peart to implement monitoring and evaluating an incoming access request using at least one update-related parameter, the result still would not yield the required step of determining the availability of at least one server device. This is underscored by the motivation asserted by the Office Action: "One would be motivated to do so because this would allow the request to reach the appropriate destination to be serviced." As an initial matter, Applicant notes that the asserted motivation is not shown to be anywhere in the prior art or knowledge of one skilled in the art, and does not fall within the previously discussed "implicit" motivations, and therefore appears to be an improper application of the TSM test. In any event, the asserted motivation again does not address the required determining step -- even if one were motivated to "allow the request to reach the appropriate destination" that asserted motivation would not address, or result in, the use of a step determining the availability of at least one server device. Again, from the foregoing, the asserted combination of Boivie and Peart only relates to the selection of a server, and does not teach, suggest, or otherwise render obvious the step of determining the

availability of at least one device server, or immediately processing incoming access requests upon making that determination. As a result, Applicant respectfully submits that Boivie and Peart do not render claim 1 obvious, and that claim 1 (and all claims dependent therefrom) is therefore allowable.

Moving on to independent claim 19, that claim is amended in this response to include now cancelled claim 22's requirement of "wherein the access control unit is adapted to determine an incoming access request volume at the at least one device server and ability of the at least one device server to service additional incoming access requests." Regarding that claim limitation, the Office Action, in its discussion of claim 22, asserted that "Boivie further teaches wherein the access control unit is adapted to determine an incoming access request volume at the at least one device server and ability of the at lest on device server to service additional incoming access requests" at col. 5, lines 22-28. The cited portion of Boivie reads:

> The CBM 110 may queue incoming requests in a set of queues (as described in further detail below) in order to satisfy service level agreements (also described below). The CBM selects a request from the queues, selects one of the servers 101 (e.g., Server 1, Server_2, Server_3, etc.) to service the request, and sends the request to that server.

Again, similar to the above discussion regarding claim 1, the cited Boivie excerpt relates to selection of one server from among a group of servers, and does not disclose an access control unit adapted to determine an incoming access request volume at the at least one device server and ability of the at least one device server to service additional incoming access requests. The Office Action further cited Boivie at col. 5, lines 25-28 (already discussed above) and at col. 7, lines 10-17 as teaching wherein the access control unit is adapted to immediately process and manage incoming information access requests from the at least one electronic device. Col. 7, lines 10-17 of Boivie state,

> Based on the data from the traffic estimator, service level agreement (SLA) information (e.g., provided by the

> server(s)), and other configuration information (e.g., the connectivity between the CBM and servers), the scheduler 350 selects a request in the queuing system 360, and determines the server node 011 to service the request, and sends the selected request to the server node over link 280.

This portion of Boivie again relates to selecting a particular server, and does not teach, suggest, or otherwise render obvious amended claim 19's access control unit that is adapted to determine an incoming access request volume at the at least one device server and ability of the at least one device server to service additional incoming access requests and wherein the access control unit is adapted to immediately process and manage incoming information access requests from the at least one electronic device. For at least the foregoing reasons, Applicant respectfully submits that claim 19 (and its dependent claims) are also allowable.

Moving on to the next independent claim, Applicant submits that claim 42 is not obvious because Boivie and Peart, alone or in combination, do not teach, suggest, or otherwise render obvious a method of managing incoming access requests during an update event from a plurality of electronic devices in a communication network, including, *inter alia*, the step of determining whether the incoming access requests is able to be processed based upon the at least one selection-related parameter. The Office Action again cited Boivie at col. 5, lines 25-28, for "determining whether the incoming access requests is able to be processed." That portion of Boivie, quoted earlier in this response, relates to selecting a server, and does not teach or suggest determining whether the request is able to be processed. The Office Action also cites Peart at col. 29, lines 55-58 as teaching monitoring and evaluating the incoming access requests using the at least one update-related parameter. Applicant initially notes that claim 42 recites "monitoring and evaluating the incoming access requests using the at least one selection-related parameter" and "determining whether the incoming access requests is able to be processed based upon the at least one selection-related parameter. In any event, that portion of Peart states, "The request typically includes a parameter that identifies the selected data file on the web server, such as a Uniform Resource Locator (URL)." Applicant respectfully submits that the cited portion of Peart

does not teach, suggest, or otherwise render obvious determining whether the incoming access request is able to be processed based upon the at least one selection-related parameter. Therefore, Applicant respectfully submits that claim 42 and its dependent claims are allowable over Boivie and Peart.

With further regard to claim 27 (dependent from claim 19), Applicant respectfully submits that Boivie and Peart do not render that claim obvious because they do not, alone or in combination, teach, suggest, or otherwise render obvious "wherein the access control unit is adapted to determine priority of an incoming access request by recognizing that the incoming access request is one of a repeated and rescheduled access request." The Office Action cited Boivie at col. 4, lines 40-41 as teaching that limitation. That portion of Boivie states, "Further, incoming requests are served by priority order and not necessarily in their order of arrival." Applicant respectfully submits that the relied-upon portion of Boivie does not teach or suggest "recognizing that the incoming access request is one of a repeated and rescheduled access request," let alone determining priority of an incoming access request by recognizing that the incoming access request is one of a repeated and rescheduled access request. Applicant therefore submits that claim 27 is further allowable for that additional reason.

Rejection of claims 13-18 as unpatentable over Boivie in view of Vogl

Applicant respectfully submits that independent claim 13 and its dependent claims are allowable at least because Boivie and Vogl, either alone or in combination, do not teach, suggest, or otherwise render obvious a method of managing incoming access requests including "evaluating the incoming access requests, the incoming access requests at least comprising at least one update-related parameter; recognizing that an incoming access request is a rescheduled access request; and fulfilling the rescheduled access request with higher priority than an original request."

As an initial matter, Applicant, as discussed above with respect to claim 27, respectfully submits that Boivie does not teach or suggest "recognizing that the incoming access request is one of a repeated and rescheduled access request."

Applicant appreciates the Office Action's recognition, in connection with claim 13, that "Boivie does not explicitly teach evaluating the incoming access requests, the incoming access requests at least comprising at least one update-related parameter and wherein the request is a rescheduled access request." The Office Action then relies on Vogl to supply the deficiencies of Boivie. Specifically, the Office Action relies on Vogl at col. 15, lines 17-22 as teaching "wherein the request is a rescheduled access request." As an initial matter, Applicant notes that claim 13 recites "recognizing that an incoming access request is a rescheduled access request." The cited portion of Vogl states, "By updating the history log 400, the dispatching process 600 can provide feedback to a scheduler (128, 134) so that it can dynamically reschedule transmissions due to delays in the network or due to unexpected increases in network bandwidth." Applicant notes that Vogl only discusses rescheduling of transmissions, and does not teach or suggest recognizing that an incoming request is a rescheduled request, let alone recognizing that an incoming access request is a rescheduled access request and fulfilling the rescheduled access request with higher priority than an original request. Because the combination of Boivie and Vogl does not teach, suggest, or otherwise render obvious, at least, the step of recognizing that an incoming access request is a rescheduled request, Applicant submits those references do not render claim 13 and its dependent claims obvious.

With further regard, for example, to claim 15, Applicant submits that claim is further allowable for the additional reason that Boivie and Vogl do not render obvious "wherein fulfilling the rescheduled access request with higher priority than an original request comprises advancing the rescheduled request in a processing queue." The Office Action cited Boivie at col. 6. lines 40-41 as teaching that limitation. That portion of Boivie, also quoted previously, states, "Further, incoming requests are served by priority order and not necessarily in their order of arrival." From above, that statement in Boivie does not teach or suggest recognizing an incoming request as a rescheduled request. Nor does that statement teach or suggest advancing the rescheduled request within a queue. In fact, other portions of Boivie do not teach advancing through a queue, but instead relate to the maintenance of different queues. (*See* Boivie at col. 5,

lines 44-46 ("The requests in a queue 250 are serviced first-in first out (FIFO) within each particular class (type) of requests"); *see also id*. at col. 5, lines 55-57, "Hence, within each particular queue, the FIFO [first-in, first-out] processing is preserved but not across different queues.") As a result, applicant submits that the cited art does not teach, suggest, or otherwise render obvious "wherein fulfilling the rescheduled access request with higher priority than an original request comprises advancing the rescheduled request in a processing queue," thereby providing an additional reason for the allowability of claim 15.

Rejection of claims 2, 7, 12, 32-34, 37, 39, and 44 were rejected over Boivie and Peart further in view of Vogl

Applicant respectfully submits that claim 2 is allowable over Boivie, Peart, and Vogl, because those references, either alone or in combination, do not teach, suggest, or otherwise render obvious the method of claim 1 wherein communicating comprises determining at least one alternate schedule for the electronic device to send a rescheduled access request upon determining that the at last on device server is unavailable for processing, based upon the at least on update-related parameter. As an initial matter, claim 2 (along with claim 7 and claim 12) depends from claim 1 and is therefore allowable as discussed above with respect to claim 1. With specific regard to claim 2, the Office Action recognized that Boivie and Peart "do not explicitly teach wherein communicating comprises determining at least one alternate schedule for the electronic device to send a rescheduled access request upon determining that the at least one device server is unavailable for processing, based upon the at least one update-related parameter." The Office Action then asserted that Vogl "teaches determining at least one alternate schedule for the electronic device to send a rescheduled access request upon determining that the at least one device server is unavailable for processing." The Office Action cited Vogl at col. 3, lines 22-25 as teaching that limitation. That portion of Vogl states, "The scheduler then reschedules one or more of the portions if one or more of the portions can not be scheduled to meet the respective transmission criteria." Applicant first notes that the "portions" of Vogl are

described, at col. 3, lines 2-3 as "portions of one or more of the files to be written to the respective network buffers..." Applicant respectfully submits that Vogl's discussion regarding "reschedul[ing] one or more portions" does not teach or suggest determining an alternate schedule as part of a step of communicating at least one message to electronic devices (see claim 1), or determining at least one alternate schedule for the electronic device to send a rescheduled access request. The Office Action does not explain how or why a rescheduling of portions of a file to be written to a network buffer would teach or suggest determining an alternate schedule for an electronic device to send a rescheduled request. Put another way, the determination of an alternate schedule for the electronic device to send a rescheduled access request is patentably distinct from the "scheduler" of Vogl that "reschedules one or more of the portions if one or more of the portions can not be scheduled to meet the respective transmission criteria."

Regarding claims 7 and 12 the Office Action relied on the same grounds as used to reject claim 2 ("Vogl teaches...see claim 2 rejection above"). Applicant respectfully submits that, in addition to not teaching the limitations of claim 2, the cited portions of Vogl do not teach or suggest, for example, "communicating an alternate schedule to send a rescheduled access request along with an explanatory denial of service message" or "wherein the alternate schedule information comprises at least one of..."

Applicant respectfully submits that claims 32-34 and 37 are allowable for reasons similar to those discussed above. In connection with those claims, Applicant additionally notes, as a further example of the apparent "TSM" test applied, that the Office Action stated,

> It would have been obvious to a person of ordinary skill in the art at the time the invention was made to modify the system of Boivie and Peart in view of Vogl by implementing...One would be motivated to do so because Boivie teaches that by default browsers will retransmit requests when the browser cannot obtain a response. Therefore, by implementing such means, the control is given to the user and/or electronic device.

As an initial matter, such a combination would not result in the presently claimed subject matter, as discussed above. Moreover, no evidence or explanation is provided to show how or why the asserted "motivation" stated would lead to the presently claimed subject matter, or how Boivie's asserted teaching of a browser retransmitting a request by default would motivate one to "implement[] such means" so that "control is given to the user and/or electronic device." The Office Action provides no evidence or explanation of a motivation in the prior art or knowledge of one skilled in the art to change the asserted teaching of Boivie of a browser retransmitting a request by default. In fact, such a teaching of a browser retransmitting requests by default would teach against "giv[ing control] to the user and/or electronic device." Nor does the motivation appear similar to the potential "implicit" motivations discussed previously. Instead, the Office Action appears to be presenting an improper "hindsight" analysis. Applicant respectfully submits that, in light of the shortcomings of the prior art pointed out previously, and in further view of the improper "motivations" provided by the Office Action, that the presently claimed subject matter is allowable. Applicant similarly respectfully submits that claims 39 and 42 are allowable, for reasons similar to those discussed with respect to claims 2, 7, 12, 32-34, and 37.

Conclusion

In general, the Office action makes various statements regarding the claims and the cited reference that are now moot in light of the above. Thus, Applicant will not address such statements at the present time. However, Applicant expressly reserves the right to challenge such statements in the future should the need arise (e.g., if such statements should become relevant by appearing in a rejection of any current or future claim).

As discussed above, Applicant believes that all of claims 1-21 and 23-44 are in condition for allowance. Should the Examiner disagree or have any questions regarding this submission, the Applicants invite the Examiner to contact the undersigned at (312) 775-8000 for an interview.

A Notice of Allowability is courteously solicited.

Respectfully submitted,

Date: May 5, 2008

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